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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER LEON WAFER, Defendant and Appellant.	F075412 (Super. Ct. Nos. F11900322, F16906924) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. Glenda S. Allen-Hill and James Petrucelli, Judges.[†]

Frank J. Torrano, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and F. Matt Chen, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Levy, Acting P.J., Meehan, J. and DeSantos, J.

[†] Judge Allen-Hill presided on January 27, 2017, and February 6, 2017; Judge Petrucelli presided over all other hearings pertinent to this appeal.

On December 5, 2016, defendant Christopher Leon Wafer was charged with criminal threats (Pen. Code,[1] § 422 [count 1]); willful infliction of corporal injury upon a cohabitant (§ 273.5, subd. (f)(2) [count 2]); and witness dissuasion (§ 136.1, subd. (b)(2) [counts 3-5]). In connection with count 2, the information alleged he was convicted of spousal battery (§ 243, subd. (e)(1)) on November 20, 2012. On February 17, 2017, following a trial, the jury found defendant guilty as charged.[2] At the March 20, 2017 sentencing hearing, the trial court suspended imposition of sentence for three years and placed defendant on formal probation on the condition he serve concurrent one-year jail terms on each count, inter alia.[3]

In his opening brief, defendant contends the trial court's grant of his request to represent himself and conduct his own defense pursuant to *Faretta v. California* (1975) 422 U.S. 806 constituted reversible error. In a supplemental brief, he argues for retroactive application of section 1001.36, which authorizes pretrial diversion in certain cases involving mentally disordered offenders. For the reasons set forth below, we reject these claims and affirm the judgment.

STATEMENT OF FACTS

Beginning on May 1, 2016, defendant lived with his girlfriend N.B. and her two minor daughters. On June 30, 2016, N.B. opened defendant's cell phone and found text messages to and from other women. She became upset and left the apartment with her children in tow because she did not want to be around him. N.B. subsequently texted defendant about her discovery. The two quarreled after she and her daughters returned to

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1 Subsequent statutory citations refer to the Penal Code.

2 Immediately thereafter, at a violation-of-probation (VOP) hearing, the court judicially noticed the verdicts and found defendant failed to comply with conditions of probation.

3 In connection with defendant's VOP case, the court revoked and then reinstated probation under the same terms and conditions.

the apartment. Eventually, defendant's voice grew louder and he uttered profanity. He then "smashed [a tablet computer] on the table" and "punched his TV." N.B. became frightened. She went to her daughters' bedroom and attempted to pacify her children, who were also scared.

An hour later, when the commotion subsided, N.B. moved her daughters to her own bedroom. While the three were watching television to "get their mind off of what was going on," defendant entered. He "went into the closet to start grabbing his stuff" and "kept . . . cursing at [N.B.]." At one point, defendant "swung at [N.B.'s chin]." Although he "missed . . . what he was aiming for," he still scratched her right arm. Defendant was "verbally abusive and whatnot for about another few minutes" before he left the room. N.B. closed the door and ultimately fell asleep with her children.

On the morning of July 1, 2016, defendant reentered N.B.'s bedroom "arguing" and "cursing," which woke up N.B. He wanted her to drive him to the bank so he could withdraw some money he owed her and be "done with" her. N.B. agreed to do so and brought along her daughters. En route to the bank, defendant called N.B. "a bitch" and "an ugly motherfucker." He continued to curse on the ride home following the withdrawal.

After N.B. parked her vehicle, she, her children, and defendant made their way to their apartment. Defendant continued screaming. Because several neighbors were around, N.B. implored defendant to lower his voice. He responded, "I don't care about these neighbors, these neighbors could kiss my ass." At some point, N.B. said, "[J]ust stop already, it's enough, just stop." Defendant retorted, "[S]hut the fuck up before I fuck you up." N.B. was "shaken." Once inside the apartment, she instructed a neighbor via text message to call the police. When the neighbor asked whether "everything [was] okay," N.B. answered, "[N]o, I'm scared and I don't want to call the cops in front of [defendant]."

Approximately 15 to 20 minutes later, at or around 12:30 p.m., Fresno Police Officers Escareno and Yang arrived at the apartment. According to Escareno, N.B. "looked like she had been crying." Escareno questioned defendant while Yang escorted N.B. outside. During the interview, defendant "became a little bit more upset." He "started to raise his voice," "started to . . . clench his fists," "paced . . . back and forth," and "was a little animated." Defendant remarked "he hope[d] [N.B.] had made good allegations against him because when he got out, he was going to find her and he was going to fuck her up." He was taken into custody.

Between July 5 and July 26, 2016, defendant repeatedly phoned N.B. from jail. He told her to drop the charges.

DISCUSSION

I. *Faretta* motion

a. *Background*

On January 26, 2017, the public defender appearing on behalf of defendant declared a conflict of interest. The trial court relieved the public defender and appointed attorney Richard Esquivel to represent defendant in both the criminal prosecution and the VOP hearing (see *ante,* fn. 2). After the court scheduled a settlement conference on January 27, 2017, and tentatively scheduled a trial for January 30, 2017, defendant indicated he was unwilling to waive time and wanted to proceed with the VOP hearing. Esquivel—"against [defendant's] wishes"—asked the court to "trail [the VOP hearing] behind the trial case" because he was "not prepared to commit malpractice and go forward on a hearing that [he was] not prepared for." The court found good cause to "continue the VOP to January 30th to trail . . . the trial case . . . ."

At the January 27, 2017 hearing, Esquivel advised the court:

> "I spoke to [defendant] yesterday. I spoke[] to him today. It is his desire to go forward with trial. I've informed him that we're not prepared to go forward with trial and I would be requesting additional time to review

the file, speak to him before going to trial. [¶] I believe it is his desire at this point to represent himself and go forward."

When the court asked whether Esquivel was correct, defendant stated, "Yes." The court instructed defendant to complete and file a document titled "**ADVISEMENT AND WAIVER OF RIGHT TO COUNSEL (Faretta Waiver)**." The document detailed several disadvantages of self-representation and the court's recommendation to accept appointed counsel, inter alia. Defendant signed the form, certifying he "read, understood, and considered all of the above warnings," "still want[ed] to represent [him]self," and "freely and voluntarily g[a]ve up [his] rights to have a lawyer represent [him]."

After the form was submitted, the following colloquy transpired in open court:

"THE COURT: . . . . [¶] . . . [W]e need to discuss the motion to represent yourself, we call it a *Faretta* motion because that's the case that established how we go about granting such a request. The law disfavors you representing yourself. [¶] [Do y]ou understand that . . . ?

"THE DEFENDANT: I understand.

"THE COURT: . . . . [¶] The Court would advise you that it is not in your best interest to represent yourself, that you should not do so but you have the right to represent yourself even after the Court admonishes that it's not in your best interest. It's certainly disfavored in the law for you to represent yourself. It's very difficult for you to do that. Even if you have a law degree the Court would be telling you not to do that. [¶] You understand that . . . ? [¶] . . . [¶]

"THE DEFENDANT: Yes.

"THE COURT: Do you understand that it's in your best interest to have counsel represent you?

"THE DEFENDANT: Yes.

"THE COURT: And despite all of that, you're still asking to represent yourself?

"THE DEFENDANT: Yes.

"THE COURT: The Court will allow you to represent yourself in this matter, then the Court will grant that motion." (Italics added.)

Defendant later clarified he wanted to represent himself in the VOP hearing only. The court granted the *Faretta* motion as to the VOP hearing; Esquivel was still appointed to represent defendant in the criminal prosecution. The court scheduled the trial and VOP hearing for February 6, 2017.

At the February 6, 2017 hearing, the following colloquy transpired:

> "THE COURT: . . . . [¶] What's the status on the jury trial?
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> "MR. ESQUIVEL: Your Honor, I've just got assigned out on a case that times out before [defendant]'s. In addition, I simply wouldn't be prepared to go forward on this case at any rate. I have to review his discovery, make sure all the investigation has been done. I'm going to ask to trail this to the 9th and see where we are in our trial. [¶] . . . [¶]
>
> "THE COURT: . . . [Y]ou understand that request?
>
> "THE [DEFENDANT]: I do understand it, and I'm not waiving any time. He's not prepared. I'm prepared to represent myself in both cases.
>
> "THE COURT: Well, let me explain something . . . . Your case doesn't time out until February 14th.
>
> "THE DEFENDANT: I know.
>
> "THE COURT: So it is my intention to trail this case within time to February 9th. Are you making a request to represent yourself on [the criminal prosecution]?
>
> "THE DEFENDANT: Correct. If he's not prepared, I got it."

Defendant submitted a second "**ADVISEMENT AND WAIVER OF RIGHT TO COUNSEL (Faretta Waiver)**" and the court conducted a hearing on the request later that afternoon. The following colloquy transpired:

> "THE COURT: . . . . [¶] . . . [Y]ou have been through the issue of [the] *Faretta* [m]otion. The Court granted the motion for you to represent yourself in [the criminal prosecution], and then you brought it to my attention that you did not wish to represent yourself in [the criminal prosecution], only in the violation of probation case. [¶] Those circumstances have changed; is that correct . . . ?

"THE DEFENDANT: Correct.

"THE COURT: At this point in time you believe that you have the ability to represent yourself in the matter that's going to trial . . . . [¶] Is that correct?

"THE DEFENDANT: Correct.

"THE COURT: And . . . you understand that it will be your responsibility to do a number of things that generally an attorney would be doing for you, and that's, specifically, picking a jury, making determinations as to which, if any, motions need to be filed, motions in limine, in particular eliminating certain testimony. [¶] . . . [¶]

"THE DEFENDANT: Correct. [¶] . . . [¶]

"THE COURT: The Court previously told you that I would encourage you not to represent yourself, that it's not a smart move to represent yourself . . . , particularly in a felony matter, but in any type of proceeding, but you have read the form and it is still your request to represent yourself despite the Court's strong admonition that you not do so. [¶] Is that correct?

"THE DEFENDANT: Correct.

"THE COURT: You are set for trial for tomorrow. Are you confirming that trial tomorrow?

"THE DEFENDANT: Yes.

"THE COURT: The matter then is confirmed for trial. [Defendant] is representing himself on tomorrow's date. . . . [¶] . . . You continue to represent yourself in the matter that's trailing, the misdemeanor violation of probation. [¶] Is that correct?

"THE DEFENDANT: Correct.

"THE COURT: And do you want that matter to continue to trail?

"THE DEFENDANT: I would like that matter to be over with.

"THE COURT: I understand that, and how would you like to go about having that matter over with?

"THE DEFENDANT: Um, I guess I don't have no problem taking that to trial so, you know –

"THE COURT: It is set tomorrow for –

"THE DEFENDANT: Oh, okay, yeah.

"THE COURT: – Contested Hearing, that's my recollection, so it's really not trailing, it's set tomorrow for Contested Hearing.

"THE DEFENDANT: Okay." (Italics added.)

On February 8, 2017, the second day of trial, the following colloquy transpired:

"THE COURT: . . . . [¶] All right. Now, the first issue I want to cover is that this will be a final opportunity . . . for you to let the Court know if you wish to have an attorney assist you. I have discussed this with you off the record. You have assured the Court that you wish to represent yourself. Is that correct?

"[THE DEFENDANT]: Correct.

"THE COURT: I've also discussed with you that you will be held to the same standards as any other attorney from a procedural standpoint, and the appropriate instruction will be read to the jury regarding that. [¶] I have also instructed you that once this trial commences, that I would treat any requests for continuance as I would any other attorney in your circumstance. Do you understand all of that?

"[THE DEFENDANT]: Yes.

"THE COURT: And if, in fact, during this trial you request the assistance of counsel, you have made this determination knowingly and intelligently, and you wish to proceed knowing that I would not stop the trial because of your request for counsel. Do you understand that, sir?

"[THE DEFENDANT]: Yes."

On February 15, 2017, the sixth day of trial, after the prosecution rested, the following colloquy transpired:

"THE COURT: What are we going to do, . . . ?

"[THE DEFENDANT]: Put me on the stand.

"THE COURT: Well, if you want to testify –

"[THE DEFENDANT]: I sure do.

"THE COURT: All right. Now, I caution you, . . . –

"[THE DEFENDANT]: I don't need no more of your caution. Let's get this done. I've been doing a pretty good job so far, not bad for a veteran with a brain injury. I know what I'm doing now, don't I? Thank you. I don't need any more of your caution. I'm ready to testify."

b. *Analysis*

" 'A criminal defendant has a right, under the Sixth Amendment to the federal Constitution, to conduct his own defense, provided that he knowingly and intelligently waives his Sixth Amendment right to the assistance of counsel. [Citations.] A defendant seeking to represent himself "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' [Citation.]" [Citation.]' " (*People v. Burgener* (2009) 46 Cal.4th 231, 240-241.)

Defendant contends his waiver was invalid because he was not warned about the maximum possible punishment that could be imposed if he were found guilty of the charged crimes. (See *People v. Jackio* (2015) 236 Cal.App.4th 445, 454-455.) Even assuming, arguendo, the trial court had an affirmative duty to admonish defendant about the maximum possible punishment, "we . . . reject defendant's contention that the omission of this single piece of information from the court's extensive colloquy with him about the hazards and risks of self-representation requires an automatic reversal." (*People v. Bush* (2017) 7 Cal.App.5th 457, 474 (*Bush*).)

"Although the denial of a proper request for self-representation has been determined to be structural error [citation], neither the federal Supreme Court nor the state Supreme Court has decided whether the granting of a request for self-representation based on an inadequate *Faretta* admonishment compels the same result. [Citations.] Our state courts that have addressed the question have applied the *Chapman*[4] harmless error

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4 *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*).

standard. [Citations.] Although two California courts have applied automatic reversal following errors in allowing self-representation, the cases are readily distinguishable. In both instances the defendants received *no* self-representation warnings at all before being allowed to proceed without counsel. [Citations.]" (*Bush, supra*, 7 Cal.App.5th at p. 475, fns. omitted.)

"[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." (*Chapman, supra*, 386 U.S. at p. 24.) In the instant case, defendant exhibited his unwillingness to waive time even though his then-counsel Esquivel was newly appointed and was not prepared to proceed. As to both the VOP hearing and the criminal prosecution, defendant completed and signed *Faretta* waiver forms certifying he was freely and voluntarily relinquishing his right to have an attorney represent him. At multiple hearings and even at trial, he maintained he wanted to represent himself even though the court warned him about the difficulties and disadvantages of doing so. "[T]he record as a whole . . . convinces us beyond a reasonable doubt that defendant knew what he was doing in requesting self-representation, made his choice with eyes open, and would have done the same even if the court had advised him specifically about the maximum potential [punishment] on conviction." (*Bush*, *supra*, 7 Cal.App.5th at p. 477, fn. omitted.)

II. Section 1001.36

In a supplemental brief, defendant argues for retroactive application of section 1001.36. He cites as supporting authority *People v. Frahs* (2018) 27 Cal.App.5th 784, review granted December 27, 2018, S252220.

"Section 1001.36 created a diversion program for defendants who suffer from medically recognized mental disorders, 'including, but not limited to, bipolar disorder, schizophrenia, schizoaffective disorder, or post-traumatic stress disorder . . . .' " (*People v. Craine* (2019) 35 Cal.App.5th 744, 750, review granted September 11, 2019, S256671 (*Craine*), quoting § 1001.36, subd. (b)(1)(A).) "Enacted as part of Assembly Bill

No. 1810 (2017-2018 Reg. Sess.) . . . , which was a budget trailer bill, the law took effect on June 27, 2018. [Citation.] Three months later, the statute was amended to prohibit its use in cases involving murder, voluntary manslaughter, rape and other sex crimes, the use of a weapon of mass destruction, and any offense 'for which a person, if convicted, would be required to register pursuant to [s]ection 290, except for a violation of [s]ection 314[, i.e., indecent exposure].' [Citations.]" (*Craine, supra*, at p. 750.) "Subject to numerous caveats and restrictions, trial courts may now 'grant pretrial diversion' when a mentally disordered individual is charged with a misdemeanor or felony offense (other than those previously mentioned)." (*Id.* at p. 751, quoting § 1001.36, subd. (a).) Pretrial diversion "means the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication, to allow the defendant to undergo mental health treatment, subject to [additional restrictions.]" (§ 1001.36, subd. (c).)

" 'The Legislature ordinarily makes laws that will apply to events that will occur in the future. Accordingly, there is a presumption that laws apply prospectively rather than retroactively. But this presumption against retroactivity is a canon of statutory interpretation rather than a constitutional mandate. [Citation.] Therefore, the Legislature can ordinarily enact laws that apply retroactively, either explicitly or by implication. [Citation.] In order to determine if a law is meant to apply retroactively, the role of a court is to determine the intent of the Legislature . . . . [Citation.]' [Citation.]" (*People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 307.) " '[I]n the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible . . . .' [Citations.]" (*Id.* at p. 308.)

In *Craine*, our court recognized section 1001.36 "confers a potentially ameliorative benefit to a specified class of persons. The question, however, is whether the class includes defendants who have already been found guilty of the crimes for which they were charged." (*Craine, supra,* 35 Cal.App.5th at p. 754, rev.gr.) We focused on

"how the Legislature chose to define the benefit itself, i.e., pretrial diversion." (*Ibid.*) We held:

> "As discussed ' "pretrial diversion" mean the *postponement of prosecution,* either temporarily or permanently, at any point in the judicial process *from the point at which the accused is charged until adjudication* . . . .' [Citation.] We agree . . . that 'adjudication,' which is an undefined term, is shorthand for the adjudication of guilt or acquittal. [Citations.] At most, 'adjudication' could be synonymous with the rendition or pronouncement of judgment, which occurs at the time of sentencing. [Citations.] Beyond that point, the trial court ordinarily ceases to have jurisdiction over the matter. [Citations.]
>
> "The *Frahs* opinion concedes the limits of the term 'adjudication,' recognizing the appellant had 'technically been "adjudicated" in the trial court.' [Citation.] However, *Frahs* concludes this language is not probative of the Legislature's intent because '[t]he fact that mental health diversion is available only up until the time that a defendant's case is "adjudicated" is simply how this particular diversion program is ordinarily designed to operate.' [Citation.] We do not agree with this reasoning. First, '[t]he purpose of those programs is precisely to *avoid* the necessity of a trial.' [Citation.] Second, the canons of statutory interpretation require scrutiny of the relevant text, 'giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided.' [Citation.]
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> "The other key definitional phrase is 'the postponement of prosecution.' [Citation.] . . . [P]rosecution is synonymous with 'criminal action,' and it means ' "[t]he proceeding by which a party charged with a public offense is accused and brought to trial and punishment." ' [Citations.] A prosecution 'commences when the indictment or information is filed in the superior court and normally continues until . . . the accused is "brought to trial and punishment" or is acquitted.' [Citation.] Accordingly, . . . trial is 'the penultimate step in a criminal action,' and the final step is 'punishment.' [Citation.] Based on these principles, we conclude the prosecution phase ends with the rendition of judgment and sentencing.
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> "Pursuant to the Legislature's own terminology, pretrial diversion is literally and functionally impossible once a defendant has been tried, found guilty, and sentenced. Upon reaching this point of 'adjudication,' the 'prosecution' is over and there is nothing left to postpone. . . . [¶] . . . [¶]

". . . Pursuant to the foregoing analysis, we hold section 1001.36 does not apply retroactively to defendants whose cases have progressed beyond trial, adjudication of guilt, and sentencing. . . ." (*Craine*, *supra*, 35 Cal.App.5th at pp. 755-756, 760, rev.gr.)

In view of *Craine*,[5] we reject defendant's claim.

DISPOSITION

The judgment is affirmed.

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[5] Our Supreme Court granted review of *Craine*, *supra*, 35 Cal.App.5th 744 on September 11, 2019, S256671. Under California Rules of Court, rule 8.1115, which was recently amended, we may rely on *Craine* as persuasive authority while review is pending. (Cal. Rules of Court, rule 8.1115(e)(1), eff. July 1, 2016.)